Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75–1678

FEDERAL POWER COMMISSION,
Petitioner

v.

MISSISSIPPI PUBLIC SERVICE COMMISSION, *et al.*,
Respondents

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF AMICUS CURIAE ON BEHALF OF CONSOLIDATED GAS SUPPLY CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 42 of the Rules of this Court, consent to the filing of this brief amicus curiae has been granted by all parties to this proceeding.

QUESTION PRESENTED

Whether the Federal Power Commission has jurisdiction pursuant to its transportation authority, as distinguished from its rate-setting authority, to consider the need for compensation to insure the justness and reasonableness under

Section 4(b) of the Natural Gas Act, 15 U.S.C. §717c(b), of a curtailment plan.

STATUTES AND REGULATIONS INVOLVED

In addition to the statutes and regulations cited in the petition, the following sections of the Natural Gas Act are also relevant to this proceeding:

> Section 4(a) of the Natural Gas Act, 15 U.S.C. §717c(a):
>
> All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> Section 16 of the Natural Gas Act, 15 U.S.C. §717o:
>
> The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

INTEREST OF AMICUS CURIAE

In this case,[1] the Court of Appeals for the Fifth Circuit held that the Federal Power Commission (Commission) has jurisdiction pursuant to its transportation authority under the Natural Gas Act (Act),[2] as distinguished from its rate-setting authority, to consider whether compensation payments are necessary to insure the justness and reasonableness of a curtailment plan under Section 4(b) of the Act.[3]

Consolidated Gas Supply Corporation (Consolidated) is a natural gas company that makes sales for resale in interstate commerce subject to the jurisdiction of the Commission. It is, therefore, required by Section 4(c) of the Act, 15 U.S.C. §717c(c), to file schedules showing all rates and charges for any transportation or sale of natural gas subject to the jurisdiction of the Commission. When Consolidated filed its end-use curtailment plan as a part of its gas tariff for these

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[1] Mississippi Public Service Comm'n v. F.P.C., 522 F.2d 1345 (5th Cir. 1975), *petition for cert. filed sub nom.*, F.P.C. v. Mississippi Public Service Comm'n, 44 U.S.L.W. 3671 (U.S. May 19, 1976).

[2] 15 U.S.C. §717(b).

[3] Section 4(b) of the Act, 15 U.S.C. §717c(b), as made applicable to the evaluation of curtailment plans in F.P.C. v. Louisiana Power & Light Co., 406 U. S. 621 (1972), provides that there shall be no undue preferences, prejudices, advantages, or disadvantages made or granted to any person; nor shall any unreasonable differences in rates, charges, services, or facilities be maintained either between localities or classes of service with respect to the transportation or sale of natural gas subject to the Commission's jurisdiction.

regulated sales, it proposed to include a billing adjustment plan designed to alleviate discriminations and preferences in service resulting from end-use curtailment. In an order dated January 15, 1975,[4] the Commission summarily rejected Consolidated's proposed billing adjustment provision; and, by order of March 10, 1975,[5] the Commission denied Consolidated's Application for Rehearing. Consolidated has petitioned for review of both Commission orders.[6]

The Petition for Certiorari filed by the Solicitor General on behalf of the Commission makes specific reference to the Consolidated proceedings and states that a reversal of the Fifth Circuit's decision in this case will be dispositive of the issues presented in Consolidated's case. Petitioner's Brief For Certiorari at 10.

Consolidated is further interested in this proceeding since it purchases a part of its gas supplies at wholesale from companies that purchase gas from United Gas Pipe Line Company (United). This case arises out of a petition for extraordinary relief from United's curtailment program. Consolidated is a party by intervention to the curtailment proceeding before the Commission and will participate on the merits in any remand of the *Mississippi* proceeding.

REASONS FOR DENYING THE WRIT

This case arises in the context of a nationwide shortage of natural gas and the problems inherent in end-use curtailment of deliveries of natural gas. Because of the adverse

[4]Consolidated Gas Supply Corp., Docket No. RP73-115, Order Accepting For Filing and Suspending Proposed Revised Tariff Sheets and Establishing Procedures (F.P.C. Jan. 15, 1975).

[5]Consolidated Gas Supply Corp., Docket No. RP73-115, Order Denying Rehearing (F.P.C. Mar. 10, 1975).

[6]Consolidated Gas Supply Corp. v. F.P.C., *petition for review filed*, No. 75-1324, D.C. Cir., Mar. 31, 1975.

economic impact of end-use curtailment, pipelines and customers of pipelines have submitted to the Commission various proposals to spread the economic burdens of curtailment. Although no two proposals are identical as, indeed, no two curtailment plans are identical, all have been loosely categorized by the Commission as "compensation schemes." Each time the Commission has been confronted with a "compensation scheme" it has refused to consider the proposal, asserting a lack of jurisdiction. The Commission has determined that all such "compensation schemes" are properly classified as a part of the rate charged by a pipeline to its customers. It has relied on this determination to assert a lack of jurisdiction over proposed compensation plans in cases, such as the case currently before this Court, where the parties requesting relief are within the Commission's transportation authority but not within its rate authority.[7] In other cases, such as the *Consolidated* case, where the Commission clearly has rate-setting authority over sales to the pipeline's resale customers, the Commission has declined jurisdiction over proposed billing adjustment provisions on the grounds that such billing adjustments constitute changes in rates in violation of Section 4 of the Act[8] and would result in a release of gas by one jurisdictional customer to another without the requisite Section 7 certificate.[9]

Thus, two clearly distinct issues are raised by the Commission's analysis of the compensation question: (1) whether the Commission has jurisdiction under its transportation authority to consider such payments; and (2) whether the Commission has jurisdiction under its rate-setting authority to determine whether such payments are legal. Although both issues are currently in litigation, the case

[7]United Gas Pipe Line Co., Docket No. RP74-37-12, Order Denying Petition For Extraordinary Relief, Granting Interventions, and Terminating Proceedings (F.P.C. Oct. 18, 1974).

[8]15 U.S.C. §717c(a).

[9]Consolidated Gas Supply Corp., Docket No. RP73-115, Order Accepting For Filing and Suspending Proposed Revised Tariff Sheets and Establishing Procedures (F.P.C. Jan. 15, 1975).

pending before this Court presents only the former. As such, it cannot be considered as representative of the industry-wide problems resulting from end-use curtailment. Indeed, even if the merits of this case could be considered at this stage of the proceedings, the Court would be attempting to address itself to vast industry-wide problems by reviewing claims for compensation from the perspective of direct sales customers who represent only a small percentage of total sales of natural gas[10] by federally regulated pipelines (jurisdictional pipelines). The Court would not have the benefit of the perspective of the customers who are within the Commission's rate-setting authority and who account for approximately 83 percent of all jurisdictional pipeline sales of natural gas.[11]

The Fifth Circuit has ruled in this case that such plans are properly considered under the Commission's transportation authority. The second issue stated above was never reached, nor could it have been since the customers requesting relief were not within the Commission's rate-setting authority. That issue, the *per se* illegality of such payments, is currently being litigated in the District of Columbia Circuit.

On March 31, 1975 Consolidated filed its petition in the District of Columbia Circuit for review of the Commission's orders determining that the billing adjustment provision in its tariff is *per se* illegal (Appendix A hereto).[12] Similar petitions for review of other Commission orders summarily rejecting

[10]Sales of natural gas to direct sales customers of federally regulated pipelines account for only approximately 17 percent of all natural gas sold by such pipelines. *Fifty-Fourth Report, Federal Power Commission,* at 34 (1974).

[11]*Fifty-Fourth Annual Report, Federal Power Commission,* at 34 (1974).

[12]By consent of the parties, the case is being held in abeyance pending a determination by this Court on the Petition for Certiorari filed in this case.

various compensation plans as to jurisdictional customers were filed in the Court of Appeals for the District of Columbia Circuit by Cascade Natural Gas Corporation, Elizabethtown Gas Company, and Transcontinental Gas Pipe Line Corporation (Transco).[13]

Whether the Commission's decision in the above-cited proceedings will be upheld or set aside by the District of Columbia Circuit, it appears likely that one of the parties will petition for review in this Court.

For the reasons stated below, Consolidated submits that the issue presented in the Petition for Certiorari is premature and that the narrow jurisdictional question actually before this Court is not of sufficient importance to warrant review. Consolidated, therefore, respectfully requests that this Court deny the present Petition for Writ of Certiorari so that the issue raised by the Solicitor General's petition on behalf of the Commission can be considered when it is properly before this Court.

If this Court should grant certiorari herein, Consolidated respectfully requests that the Court defer briefing and oral argument on the merits until the Court of Appeals for the District of Columbia Circuit has had an opportunity to rule on the issues presented in the *Consolidated* case. The District

[13]Cascade Natural Gas Corp. v. F.P.C., No. 75-1455 (D.C. Cir. filed May 6, 1975); Elizabethtown Gas Co. v. F.P.C., No. 75–1767 (D. C. Cir. filed August 7, 1975); Transcontinental Gas Pipe Line Corp., et al. v. F.P.C., CADC Nos. 74-2036, et al. The proceedings in Cascade Natural Gas Corp. are currently being held in abeyance pending a final determination by the District of Columbia Circuit in Transcontinental Gas Pipe Line Corp. In Elizabethtown Gas Co., the petitioner filed its brief on May 25, 1975, and pursuant to the Court's order of June 11, 1976, the Commission's brief is due five days following a decision by the Court on an intervenor's motion to have the case dismissed for mootness. In the Transcontinental proceedings, following this Court's remand of that case to the District of Columbia Circuit, and following the District of Columbia Circuit's subsequent remand of the case to the Commission, the Commission on June 23, 1976, issued an order finding that a natural gas shortage exists on Transco's system. As of this date, no further action has been taken in the Transcontinental proceedings.

of Columbia Circuit's opinion in the *Consolidated* case, concerning the broader national question of whether gas tariff provisions subject to the Commission's rate-setting authority are illegal *per se*, will provide this Court with considerable assistance as well as a judicial determination from which it can exercise appellate review.

If this Court grants certiorari and decides the issue presented by this case, it will not dispose of the different issues presented by the cases pending in the District of Columbia Circuit. The Court may, therefore, be required to speak further when and if petitions to review those proceedings are filed and granted.

I. The Issue Presented By The Petition Is Premature

The Petition for Certiorari misstates the issue before this Court. The petition states that the question presented is whether the Commission is "required to impose . . . proposed compensation schemes." By using a broad brush, the petition attempts to seek a judicial determination of the legality of billing adjustment provisions subject to the Commission's *rate-setting authority*—the issue presented in the *Consolidated* proceedings—rather than a review of the narrow jurisdictional question decided by the Fifth Circuit—that the Commission has jurisdiction under its *transportation authority* to consider the need for compensation payments as a part of a curtailment plan. The Fifth Circuit's limited holding in this case delineates the scope of this Court's appellate review.

The Fifth Circuit determined only that the Commission has jurisdiction pursuant to its transportation authority under the Act to consider "*whether* compensation is necessary to insure the justness and reasonableness under Section 4(b) of a particular curtailment plan."[14] The Court specifically refrained from intimating any view as to whether compensation should or should not be included in a curtailment plan. Similarly, the issue as to whether the Commission is "required" to impose compensation schemes as a part of curtailment plans, as stated in the petition, is not

[14] Mississippi Public Service Comm'n v. FPC, 522 F.2d 1345, 1350 (D.C. Cir. 1975).

before this Court. That issue goes to the merits of whether, absent compensation, a curtailment plan is unjust and unreasonable. A determination of this issue assumes jurisdiction of the Commission and must be evaluated on the facts of the particular case.

The merits of the justness and reasonableness of the United plan absent the proposed compensation scheme has not been determined by either the Commission or the Fifth Circuit. It is well established that this Court will decline to consider questions "not pressed or passed upon below." *Duignan v. United States*, 274 U.S. 195, 200 (1927).

Thus, in *NLRB v. Raytheon Co.*, 398 U.S. 25 (1970), where the issue before the Court was whether the Court of Appeals had properly dismissed the NLRB's petition for enforcement of a cease-and-desist order, the Court specifically refrained from determining whether enforcement was appropriate. In response to the respondent's assertion that, since the Court of Appeals had the entire record before it, its decision should be construed as determining that enforcement was inappropriate, the Court stated:

> "We need not pause to consider whether such a determination would have been proper on the facts of this case. The simple answer is that the Court of Appeals did not pass upon the merits of the Board's petition for enforcement." 398 U.S. at 28-29.

See, Tacon v. Arizona, 410 U.S. 351 (1973); *McCullough v. Kammerer Corp.*, 323 U.S. 327 (1945); *Gila Valley, Globe & Northern Ry. v. Hall*, 232 U.S. 94 (1914).

Indeed, in a related case, *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412 (5th Cir. 1976), the Fifth Circuit has affirmed the order of the United States District Court for the Southern District of Mississippi remanding the case to the Commission. In that case, Mississippi Power & Light Company's claim requests damages for the same financial loss for which it seeks compensation in this case. In agreeing that the District Court properly stayed the proceedings pending the exercise of primary jurisdiction

by the Commission, the Fifth Circuit stressed the importance and advisability of invoking primary jurisdiction when an issue is already before the agency. As the Fifth Circuit stated:

> "There . . . can be no doubt that the Commission's informed opinion will be of material aid to the district court . . . . First, the Commission can determine in detail the facts and circumstances that resulted in the severe shortage United is experiencing. Development of the factual context by those expert in the area, is an established basis for primary jurisdiction . . . . Fourth, the Commission is presently reviewing a request by MP&L for compensation from the customers of United who receive higher priorities. In that proceeding MP&L seeks payment for some of the very damages which it claims in this damage action . . . ." 532 F.2d at 420.

In so stating, the Fifth Circuit properly concluded that the issues in both cases are related and should be heard at the Commission level during the hearings currently in progress regarding United's curtailment plan. It is, therefore, particularly inappropriate for this Court to reach the merits of this case.

Additionally, the Fifth Circuit did not consider whether, in a proper case, the Commission would have jurisdiction under its rate-setting authority to approve a billing adjustment provision included in a proposed tariff. Indeed, the court could not have decided that issue since the parties requesting relief were direct customers of United and, therefore, not subject to the Commission's rate-setting authority. The court merely stated that, in the case before it, the Commission "necessarily sets up a jurisdictional barrier to compensation" by categorizing the proposed compensation payments as rates.[15] Had the Court of Appeals determined that the Commission's jurisdiction over compensation arose from its rate-setting authority, a jurisdictional barrier would indeed have been created in this case. However, that jurisdictional

[15] Mississippi Public Service Comm'n v. FPC, 522 F.2d at 1350.

barrier would not be present in the cases cited by the Petition as being controlled by the decision here. In all such other cases, the Commission had rate-setting authority over the pipeline's sales for resale and jurisdiction over any billing adjustments needed to offset disproportionate end-use curtailment among such customers.

The Petition for Certiorari requests that the Court address itself to all of these issues. It attempts to cloud the actual issue before this Court by referring to this Court's decision in *FPC v. Transcontinental Gas Pipe Line Corp.*, 44 U.S.L.W. 3413 (U.S. Jan. 19, 1976). In that case, this Court noted " 'the potential importance of a resolution on the merits of the compensation issue presented in the instant case' (slip op. 5)." Petitioner's Brief For Certiorari at 11. Petitioner states that these issues are "squarely presented by this petition." Petitioner's Brief For Certiorari at 11. While the petition may well "squarely present" those issues, the case that the petition seeks to have brought before this Court does not.

The question that this Court is asked to decide by the Petition for Certiorari, and that Consolidated asserts is not presented by this case, is currently under consideration by the Court of Appeals for the District of Columbia Circuit in *Consolidated Gas Supply Corp. v. FPC*, petition for review filed No. 75-1324, D.C. Cir. March 31, 1975. In this proceeding, while recognizing that it had rate-setting authority over the pipeline's customers, the Commission asserted a lack of jurisdiction to review the proposed billing adjustment provision on the ground that such provision was illegal *per se*.

By stating the "Question Presented" in such a broad manner, the petitioner attempts to deprive Consolidated, and all others whose cases are currently pending in the District of Columbia Circuit and cited in the petition, of the opportunity to have the legal issues presented in their cases decided by the Court of Appeals.

II. The Issue Actually Before This Court Does Not Warrant Review

The issue actually before this Court, whether the Commission has jurisdiction pursuant to its transportation authority to consider whether compensation in favor of non-jurisdictional customers is needed to render an end-use curtailment plan just and reasonable under the Act, does not warrant review. Since this Court's decision in *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621 (1972), deciding that the Commission's jurisdiction to consider and approve curtailment plans is broad based and specifically encompasses the authority to " 'make the pragmatic adjustments which may be called for by particular circumstances'," [16] the issue presented by this case is no longer a matter for debate.

Until this Court's decision in *FPC v. Louisiana Power & Light Co.*, it was unclear whether the Commission had jurisdiction to regulate plans involving the curtailment of natural gas deliveries to both direct and resale customers of an interstate pipeline. In that case this Court rejected the idea that curtailment regulations involved rate-setting and held that the Commission had jurisdiction under its independent authority over the transportation of natural gas to authorize curtailment of direct sales customers not subject to its rate authority. In delineating the scope of the Commission's authority over curtailment plans, the Court stated that "the Commission must possess broad powers to devise effective means to meet these responsibilities." [17] This needed flexibility is provided by Section 16 of the Act which gives the Commission the

> "... power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act." [18]

[16] 406 U.S. at 642 quoting from FPC v. Natural Gas Pipeline, 315 U.S. 575, 586 (1942).

[17] FPC v. Louisiana Power & Light Co., 406 U.S. at 642.

After *Louisiana Power & Light Co.*, several opinions by the United States Circuit Courts have reaffirmed the Commission's broad-based jurisdiction under the Act for "pervasive regulation of the curtailment question." *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 532 F.2d 412, 419 (5th Cir. 1976). *See e.g., Fort Pierce Utility Authority v. FPC*, 526 F.2d 993 (5th Cir. 1976); *Consolidated Edison Co. of New York v. FPC*, 512 F.2d 1332 (D.C. Cir. 1975), modified 518 F.2d 448 (D.C. Cir. 1975).

In the *Fort Pierce* case, the Commission found that it had jurisdiction to consider and grant the petition of a direct customer of Florida Gas Transmission Company for extraordinary relief but that it did not have jurisdiction to consider whether a compensation scheme was necessary to mitigate the adverse economic impact to other direct customers created by the granting of the petition. The Fifth Circuit upheld the Commission's order granting the petition for extraordinary relief but reversed the Commission's decision that it did not have jurisdiction over the compensation question. In so ruling, the Court responded to the challenge that the Commission did not have jurisdiction to grant extraordinary relief in the form of additional gas supplies to direct customers by stating:

> "In construing jurisdiction under the Natural Gas Act, this Court must be cognizant of Congress' intent to create a comprehensive and effective regulatory scheme. *See, Panhandle Eastern Pipeline Co. v. Public Service Commission*, 332 U.S. 507, 520 ... (1947) .... *The Commission must have the power to avoid untoward results to individual customers who would be irreparably harmed by the operation of a curtailment plan which is otherwise satisfactory.*" 526 F.2d at 998 (Emphasis added).

Similarly, in *Consolidated Edison Co. v. FPC, supra*, it was held that although the Commission has no jurisdiction

[18] 15 U.S.C. §717o.

whatsoever over intrastate indirect customers of a jurisdictional pipeline, it may properly consider the end-use of such indirect customers in determining priorities for curtailment.

The jurisdiction of the Commission over curtailment plans and the problems created by such plans is clear. As this Court stated:

> "Section 16 of the Act assures the F.P.C. the necessary degree of flexibility . . . .
>
> * * *
>
> In applying this section, we have held that 'the width of administrative authority must be measured in part by the purposes for which it was conferred . . . . Surely, the Commission's broad responsibilities therefore demand a generous construction of its statutory authority.' *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968); see *United Gas Pipe Line Co. v. F.P.C.*, 385 U.S. 83, 89-90 (1966)."

Federal Power Comm'n v. Louisiana Power & Light Co., 406 U.S. 621, 642 (1972).

CONCLUSION

The issues presented are premature and do not warrant review by this Court. For the reasons stated above, we respectfully request that this Court deny the Petition for Certiorari.

Respectfully submitted,

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July 14, 1976

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
Albert B. Brooke, Jr., Rush Moody, Jr.,
William L. Springer, and Don S. Smith.

Consolidated Natural Gas Company) Docket No. RP73-115

ORDER ACCEPTING FOR FILING AND SUSPENDING PROPOSED REVISED TARIFF SHEETS AND ESTABLISHING PROCEDURES

(Issued January 15, 1975)

On December 16, 1974, Consolidated Gas Supply Corporation (Consolidated) tendered for filing Second Revised Sheet No. 51-A, Second Revised Sheet No. 51-B, and Second Revised Sheet No. 51-C to its FPC Gas Tariff, First Revised Volume No. 1 to be effective as of December 15, 1975. Notice of these filings was issued on December 31, 1974.

Consolidated's Tariff Sheets now in effect provide for curtailment of certain partial requirements customers of Consolidated on a *pro rata* basis and that the gas shortage curtailment provisions in the revised Tariff Sheets provide for end use curtailment.

Additionally, the Tariff Sheets now in effect provide for the determination of industrial requirements on the basis of the highest twelve consecutive calendar months in the most recent twenty-four month period for which data is available. The revised Tariff Sheets will provide for the curtailment of industrial requirements on the basis of data for the twelve month period ended September 30, 1974.

The Revised Tariff Sheets would also permit the filing of petitions for extraordinary relief by any Buyer, including the Hope Natural Division, on behalf of any consumer.

Consolidated requests that the Tariff Sheets be made effective as of December 15, 1974, without suspension or with suspension for only one day to facilitate the orderly implementation of curtailment.

After reviewing the proposed revised tariff sheets, we believe that they may possibly be unjust, unreasonable, unduly discriminatory or otherwise unlawful. This conclusion is founded primarily on the fact that Consolidated's current curtailment tariff is pending before a Presiding Administrative Law Judge for decision thereon. Accordingly, we shall accept Consolidated's proposed tariff revisions for filing and suspend them for one day until January 17, 1975, when they shall be permitted to take effect. In view of the fact that the hearings in Docket No. RP73-115, *et al.*, have been completed and briefs have been filed by the parties, it would appear that a reopening of the record is in order for the purpose of receiving evidence in connection with Consolidated's revised tariff sheets. Additionally, with the proposed imposition of curtailment on the Consolidated system as of February 1, 1975, we believe that the record should include end use data with respect to the base periods that will actually be employed. To the extent that there is any change in this regard from the end use and curtailment implementation data currently in the record, we believe that Consolidated should present supplementary evidence reflecting such changes.

We shall therefore direct the Presiding Administrative Law Judge in these proceedings to convene a formal conference for the purpose of determining the scheduling of dates for the further evidentiary hearings.

Finally, we note, as in the curtailment filings of Transcontinental Gas Pipe Line Corporation (Transco) that Consolidated's curtailment sheets here under consideration and those currently in effect have a compensation feature for a customer company releasing exemption gas which we have found to be ineffective lacking a proper Section 7 certification. Therefore, for the reasons stated in our Transcontinental order[1] pending

[1] "Order Granting Rehearing in Part, Denying Rehearing in Part, and Requiring Environmental Impact Statement," issued January 10, 1975, *Transcontinental Gas Pipe Line Corporation, et al.*, Docket No. RP72-99, *et al.*

hearing and final decision, no change in Consolidated's rates shall be effective, nor any transfer of entitlements among Consolidated's customers be effectuated unless and until appropriate certificate and rate filings have been made and approved in accord with Sections 4 and 7 of the Act.

The Commission finds:

(1) It is necessary and appropriate in the public interest and to aid in the enforcement of the Natural Gas Act that the Revised Tariff Sheets herein described and submitted by Consolidated on December 16, 1974, be accepted for filing, suspended for one day and permitted to become effective January 17, 1975, subject to the terms and conditions of this order.

(2) It is necessary and appropriate that the Presiding Administrative Law Judge be directed to convene a formal conference for the purpose of determining the scheduling of dates for the further evidentiary hearings.

The Commission orders:

(A) Consolidated's filing of December 16, 1974, is hereby accepted for filing, suspended for one day and permitted to become effective January 17, 1975, pursuant to Section 154.67(a) of the Commission's Regulations and pending further Commission order or opinion in this docket.

(B) The Presiding Administrative Law Judge in these proceedings is hereby directed to convene a formal conference on or before February 28, 1975. In conformance with this order, the purpose of such formal conference shall be to determine the scheduling of dates for the further evidentiary hearings.

By the Commission. Commissioner Brooke, dissenting in part, filed a separate statement appended hereto.

(S E A L)

Kenneth F. Plumb,
Secretary.

Consolidated Natural Gas Company) Docket No. RP73-115

BROOKE, Commissioner, *dissenting in part:*

The presently effective tariffs of Consolidated provide the mechanism for transfer of exemption gas with payment of a surcharge, and this issue is presently being litigated before an Administrative Law Judge. For the same reasons set forth on the same issue in my dissent in the *Transco* case, I dissent here. The Commission order on Page 2 states that:

> "Pending hearing and final decision, no change in Consolidated's rates shall be effective, nor any transfer of entitlements among Consolidated's customers be effectuated unless and until appropriate certificate and rate filings have been made and approved in accord with Sections 4 and 7 of the (Natural Gas) Act."

Summarily, and peremptorily, without opportunity for hearing, the Commission nullifies provisions of legally effective tariff sheets, as a matter of law, on which the company and its customers had relied to manage system supply shortages this winter. A far more preferable option, in my opinion, would have been to defer decision to the Presiding Judge on the merits of the evidentiary record in the on-going case. Realistically, the option stands no chance because of the Commission's arbitrary action in *Transco.* Here, as in *Transco,* the Commission's action is legally suspect.

/s/ Albert B. Brooke, Jr.

Albert B. Brooke, Jr.
Commissioner

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
William L. Springer, and Don S. Smith.

Consolidated Gas Supply Corporation) Docket No. RP73-115

ORDER DENYING REHEARING

(Issued March 10, 1975)

The Consolidated Gas Supply Corporation seeks rehearing of our order of January 15, 1975, in this proceeding. In that order we accepted for filing, and suspended for one day, tariff sheets that had been filed by Consolidated on December 16, 1974, and we ordered hearings. Our order further noted that Consolidated's filing contained a "compensation feature", and on this point we stated:

> Finally, we note, as in the curtailment filings of Transcontinental Gas Pipe Line Corporation (Transco) that Consolidated's curtailment sheets here under consideration and those currently in effect have a compensation feature for a customer company releasing exemption gas which we have found to be ineffective lacking a proper Section 7 certification. Therefore, for the reasons stated in our Transcontinental order . . . pending hearing and final decision, no change in Consolidated's rates shall be effective, nor any transfer of entitlements among Consolidated's customers be effectuated unless and until appropriate certificate and rate filings have been made and approved in accord with Sections 4 and 7 of the [Natural Gas] Act. (p. 2)

On February 14 Consolidated applied for rehearing. Its application relates to the paragraph quoted above. Consolidated argues that our order is factually erroneous; that payments under its compensation plan should be permitted to be made but placed in escrow; and that we erred in our reference to the need for Sections 4 and 7 filings.

As to its first point, Consolidated states that its tariff does not involve "exemption gas" or any "transfer of entitlements". While our language may have been infelicitous, our conclusion was and is appropriate, and we adhere to it. That is to say, what Consolidated terms its "billing adjustments to reflect non-uniform curtailment", we view as not different in substance from the compensation plan of the Transcontinental Gas Pipe Line Corporation. In our order of January 10, 1975, in the *Transco* case (Docket No. RP72-99), we concluded that the Transco plan is unlawful for the reason, among others, that Sections 4 and 7 of the Natural Gas Act would be violated in the absence of filings pursuant to them. That the Transco and Consolidated plans are similar is clear. Consolidated states that, to implement its proposed billing adjustments,

> . . . it will be necessary for Consolidated to collect additional revenue from customers who are curtailed less than the system average so that such funds will be available for payment to customers who are curtailed by more than the system average. (Application, p. 4)

We described the Transco plan as providing

> . . . that those customers of Transco who are curtailed most heavily will receive compensation, and that such compensation will be paid by the Transco customers who are less heavily curtailed. (Order of January 10, 1975, supra, p. 5)

In the first instance in *Transco*, as in *Consolidated*, the "system average" would provide the dividing line. Accordingly, for Consolidated as well as for Transco, we remain of the view that the Consolidated "billing adjustments" cannot be made effective "until appropriate certificate and rate filings have been made and approved in accord with Sections 4 and 7 of the Act".

As to Consolidated's request that the additional revenue provided for under its billing adjustments be permitted to be collected, with the funds placed in an escrow account, we find it necessary to deny the request. Consolidated states that all of its new tariff provisions, including those that provide for billing adjustments, are now in effect and have been since January 17,

1975, pursuant to the findings and ordering clauses of our order of January 15. But Consolidated also recognizes that we may not have intended this result, given the language on page 2 (quoted above) of our January 15 order. Consolidated is quite right. We did not intend that section 11.04 of its tariff (which provides for the billing adjustments) would become effective, for it is unacceptable as a matter of law. We shall clarify the matter in this order.

In the meantime, we deny the request for an escrow arrangement. We do so because we view the compensation plan, or billing adjustment, as unlawful, and we think it would be inappropriate for us to act in a way that would permit the implementation of an unlawful scheme. We recognize that, pending resolution of the question of legality of Transco's compensation plan by the Court of Appeals, the court did accept the suggestion of escrow arrangements. That action, however, was taken by the court, and we are not ourselves disposed to take similar action.

Finally, Consolidated argues that our Section 4 and Section 7 objections—in effect incorporated from the *Transco* order of January 10—are not well taken. It says that under its billing adjustment, there will be no voluntary "sales" in interstate commerce, so that rate filings under Section 4 and certificates under Section 7 are unnecessary. As in the *Transco* case, we think that "sales" are here involved. We stated in the *Transco* order that we have entered uncharted ground, and there we remain, but our best judgement is that the billing adjustments here involved—designed as they are to ease the pain of curtailment—constitute sales as a matter of law. As such they cannot occur unless there has been compliance with Sections 4 and 7.

The Commission finds:

The assignments of error and grounds for rehearing set forth in the application for rehearing filed by the Consolidated Gas Supply Corporation in this proceeding present no facts or legal principles that would warrant any change in or modification of the Order issued January 15, 1975, in this proceeding, except that (1) there should be added at the end of Finding Clause (1) of such Order the words ", except that Section 11.04 on Second Revised Sheet No. 51-C is unlawful and shall not

become effective", and (2) there should be added at the beginning of Ordering Clause (A) of such Order the words "Except for Section 11.04 of Second Revised Sheet No. 51-C,".

The Commission orders:

(A) The Order issued January 15, 1975, in this proceeding is amended as set forth in the above finding.

(B) The application for rehearing is denied.

By the Commission.

(S E A L)

Kenneth F. Plumb,
Secretary.